CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 167.

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 7, 1906.

(20,482.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 5, 1907.

1 United States Circuit Court of Appeals, Eighth Circuit.

In re JAMES B. WOOD and JETHRO P. HENDERSON, Petitioners.

Upon Certificate to the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Paul, Minnesota, on the sixteenth day of November, A. D. 1905, certifies that the record on file in the suit above entitled, which is pending in this court upon a petition to superintend and review in matter of law a proceeding, order and judgment of the United States District Court for the District of Colorado sitting in bankruptcy, discloses the following facts:

On January 30th, 1904, one R. H. Williams was adjudged a bankrupt in said District Court of Colorado. In due time a Trustee was appointed, and the case was referred to George M. Irwin, Referee in Bankruptcy.

On the 17th day of May, 1905, the Referee in Bankruptcy made an order, reciting that the Trustee in Bankruptcy had petitioned the court representing that R. H. Williams, the bankrupt, in contemplation of the filing of the petition in bankruptcy against him, and within four months of the filing thereof, did pay to James B. Wood and Jethro P. Henderson, at the City of Hot Springs, in the County of Garland, State of Arkansas, the sum of $5,000 in cash, one certificate of deposit issued by the Security Bank of Hot Springs, Arkansas, for $3,000, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, for the sum of $1,795. The Trustee represented in said petition that said money and property were transferred to the said James B. Wood and Jethro P. Henderson for professional services as attorneys and counsellors at law to be rendered to the said R. H. Williams thereafter. The Referee further recited that by said petition it appeared that

2 said money and property were transferred to said Wood and Henderson by said Williams in contemplation of the filing of the petition in bankruptcy against him, and within four months of the filing thereof, for legal services to be rendered to him thereafter by said Wood and Henderson. He thereupon ordered that said James B. Wood and Jethro P. Henderson be, and they were, cited to "appear before this court at his office in the Hagerman Building, in the City of Colorado Springs, in the County of El Paso, and the State of Colorado, on the 20th day of June, 1905, at 2 o'clock in the afternoon, and show cause, if any they have, why an order should not be entered by this Referee determining and adjudging the reasonable value of the services rendered and contemplated to be rendered by the said James B. Wood and Jethro P. Henderson, as attorneys and counselors, for the said R. H. Williams. And the said James B. Wood and Jethro P. Henderson are further notified that in default of their appearance at the time and place above designated, this Referee will hear and determine the said matter on the evidence

presented by the said Trustee." It was further ordered that a copy of this citation, together with a copy of the petition filed by said Trustee in Bankruptcy, be served on said Wood and Henderson at the City of Hot Springs, Garland County, Arkansas, at least twenty days before the date set for said hearing, and that proof of such service be filed before the hearing thereof.

Afterwards the Referee in Bankruptcy, at a court of bankruptcy held at the place aforesaid, on the 1st day of August, 1905, in his finding and judgment on the petition of the Trustee aforesaid, after setting out the matter of the application and petition, recited:

"It appearing to the court from the evidence that a copy of this application, together with a copy of the order to show cause issued thereon returnable on the twentieth day of June, A. D. 1905, was duly served on said J. B. Wood and Jethro P. Henderson on the twenty-sixth day of May, 1905; and that the said J. B. Wood and J. P. Henderson, not having appeared on the said twentieth day of June, 1905, herein or shown to this court any cause why this court should not proceed to re-examine the said transaction. And it further appearing to this court that the matter of the said
3 hearing has been duly continued from the said twentieth day of June until this first day of August, 1905, and that due notice of such continuance has been served upon the said J. B. Wood and Jethro P. Henderson and that the said J. B. Wood and Jethro P. Henderson are fully advised that this hearing would be duly had on this day; and the said J. B. Wood and Jethro P. Henderson not having shown cause against the said application and the court having heard the evidence on the part of the said trustee in support of the said application and the arguments of counsel thereon, and the court being fully advised as to all matters of law and fact arising herein, the court doth find and adjudge that the said R. H. Williams, in contemplation of the filing of a petition in bankruptcy against him did, on the fifth day of December, 1902, transfer to said J. B. Wood and Jethro P. Henderson, attorneys at law, for services to be rendered, the sum of $5,000 lawful money of the United States, and one certificate of deposit for the sum of $3,000 issued by the Security Bank of Hot Springs, Arkansas, to the said R. H. Williams, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, to R. H. Williams for the sum of $1,795, the said two certificates of deposits having since been collected by the said J. B. Wood and Jethro P. Henderson. And the court doth find on re-examination of the said transaction that the sum of $800 is reasonable compensation for the services rendered the said bankrupt under the terms of the transaction by which said money and property *was* transferred to the said J. B. Wood and Jethro P. Henderson, and doth find and adjudge that the said transaction is valid to that extent only, which the court determines and adjudges to be the reasonable value for said services.

"It is, therefore, ordered, adjudged and decreed that the said transaction is void, except as to the sum of $800.00 so adjudged to be reasonable value for said services, and that the Trustee herein

proceed to recover the excess, to-wit, the sum of $8,995.00 from the said J. B. Wood and Jethro P. Henderson."

After this judgment was rendered the said Wood and Henderson appeared before the Referee for the sole purpose of challenging his jurisdiction to make the foregoing orders, and presented to him a petition alleging that he was without jurisdiction to make the orders aforesaid because neither the parties nor the subject matter was within the jurisdiction of the District Court of Colorado; and prayed that he would certify the proceedings had before him to the District Court in order that the same might be reviewed by the District Court. The Referee refusing to so certify the question, said Wood and Henderson presented to the District Court of Colorado a petition for an order on the Referee to make the necessary certificate. This petition was granted and an order made upon the Referee to certify the cause to that court. The order was complied with and the cause so duly certified. In the District Court the said Wood and Henderson renewed their objection to the jurisdiction of the District
4 Court over them and the subject matter and to the jurisdiction of its referee to render the judgment complained of. After hearing upon this certificate and the record in the case the District Court adjudged that the rulings and order of the Referee should be in all things confirmed.

Thereafter said Wood and Henderson filed their petition in this court for a revision in matter of law of these proceedings and for a review of the decision of the District Court of Colorado, and questioned the jurisdiction of that court and its Referee to render the judgment aforesaid. The petition for review herein alleges that at all times aforesaid, and at the time of making said order and the service thereof the petitioners were and are citizens and residents of the State of Arkansas, and that they had not at any time been or appeared within the jurisdiction of the District Court of the State of Colorado except to file their petition for review for the purpose of objecting to the jurisdiction of said Referee; that the service of notice of the proceedings before the Referee was made upon them at Hot Springs, Garland County, State of Arkansas, outside of the jurisdiction of the District Court of the United States for the District of Colorado; that the subject matter sought to be affected by the proceeding was and is certain transactions and certain moneys or properties which took place or were transferred wholly within the State of Arkansas, at the City of Hot Springs.

And the Circuit Court of Appeals of the Eighth Circuit in view of the importance of the questions of law and practice involved certifies that the following questions of law are presented by the petition for revision filed in this court in this case; that their decision is indispensable to a determination of this case, and that to the end that this court may properly decide the issue of law presented it desires the instruction of the Supreme Court of the United States upon the following questions:

1. Has a District Court of the United States sitting in bankruptcy in which the proceedings in bankruptcy are pending, or its
5 Referee, jurisdiction under Section 60*d* of the Bankrupt Act to re-examine, on petition of the trustee in bankruptcy, the

validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counsellor at law for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where such attorney or counsellor at the time of receiving such payment or property and at the time of the proceedings in question was a non-resident of the State, or of the District, in which the bankrupt court instituting such inquiry is located, and where the money or property was so paid to, and is held by, such attorney or counsellor outside of the District in which such court of bankruptcy sits and the order to show cause, citation, or notice of the proposed hearing is served upon him without, and not within the District in which such court of bankruptcy sits?

2. If a District Court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counsellor outside of the District of the court of Bankruptcy, such attorney or counsellor being non-resident of the District in which the proceedings in bankruptcy are pending?

3. May a plenary suit instituted by the trustee in bankruptcy against such attorney or counsellor in the District Court where the estate in bankruptcy is being administered be maintained upon service of process upon the attorney or counsellor, who is a non-resident of the District, outside of that District?

WALTER H. SANBORN,
Circuit Judge.
WILLIS VAN DEVANTER,
Circuit Judge.
JNO. F. PHILIPS, *District Judge.*

Filed Nov. 16, 1906.
JOHN D. JORDAN, *Clerk.*

6 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Certificate *in re* James B. Wood and Jethro P. Henderson, Petitioners, No. 71 Original, September Term, A. D. 1906, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said Certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court at office in the City of St. Paul, Minnesota, this sixteenth day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. September Term, 1906. No. 71, Original. *In re* James B. Wood and Jethro P. Henderson, Petitioners. Certificate of Questions to the Supreme Court of the United States. Filed Nov. 16, 1906. John D. Jordan, Clerk.

Endorsed on cover: File No. 20,482. U. S. circuit court appeals, 8th circuit. Term No. 167. *In re* James B. Wood and Jethro P. Henderson, petitioners. (Certificate.) Filed December 7th, 1906. File No. 20,482.

In the Supreme Court of the United States.

October Term, 1907.

No. 167.

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IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

W. SCOTT BICKSLER,
EDMON G. BENNETT,
Attorneys for Petitioners.

GEORGE L. NYE,
of Counsel.

(20,482.)

THE SMITH-BROOKS [redacted] TYPES, DENVER

In the Supreme Court of the United States.

October Term, 1907.

No. 167

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONERS.

ARGUMENT.

The record in the Circuit Court of Appeals for the Eighth Circuit discloses, in addition to the facts stated by that court in its certificate, that the petitioners, Wood & Henderson, have never appeared in the matter of R. H. Williams, bankrupt, in the District Court in Colorado, and that they are not members of the bar of that court. We think, therefore,

that the first question stated by the Circuit Court of Appeals might properly be amended to read as follows, the italics being ours:

FIRST QUESTION.

"Has a District Court of the United States sitting in bankruptcy, in which the proceedings in bankruptcy are pending, or its referee, jurisdiction under section 60 d of the bankrupt act to re-examine, on petition of the trustee in bankruptcy, the validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counsellor at law for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where such attorney or counsellor, at the time of receiving such payment or property, and at the time of the proceedings in question, was a non-resident of the state, or of the district in which the bankrupt court instituting such inquiry is located, *is not an attorney of record in the proceeding, nor a member of the bar of that court*, and where the money or property was so paid to, and is held by, such attorney or counsellor outside of the district in which such court of bankruptcy sits, and the order

> to show cause, citation or notice of the proposed hearing is served upon him without and not within the district in which such court of bankruptcy sits?"

This change, although entirely proper, and disclosed by the record, as already indicated, is not really essential to a discussion of the questions certified by the Circuit Court of Appeals, because the first question is not really changed by the amendment suggested, but the position of the petitioners is merely made a little stronger.

At the outset of this argument, and in order that the position of petitioners may be clearly defined before this court, we unhesitatingly answer "*no*" to each of the three questions propounded by the Circuit Court of Appeals.

The proceedings by the trustee in connection with this matter, from their inception, have been based squarely upon subdivision d of section 60, and in the provisions of that subdivision, and that alone, the trustee finds his authority. We think, however, that there are other provisions of the bankruptcy law which necessarily have a bearing and effect upon the determination of the questions under consideration. To such sections we shall refer as they take their place in the discussion which follows:

Coming now to the first question propounded by the Circuit Court of Appeals; this is an original question, in the sense that, so far as we have been able to determine, by a careful and thorough search of the authorities, it has never been *directly* decided.

A few cases have considered section 60, subdivision d, but have not reached the question here. We notice them briefly.

In the case, In re Lewin, 103 Fed., 850, the attorneys proceeded against were attorneys of record for the bankrupt. The attorneys and the referee lived in the same village, and were officers of the same court. In the case of Pratt vs. Bothe, 130 Fed., 670, the attorney, the payment to whom was questioned under subdivision d of section 60, instituted the proceedings himself, and invoked the jurisdiction of the court, by filing with the referee his petition for the allowance of the claim, which was there considered. In the case, In re Habegger, 139 Fed., 123, the attorney, the payment to whom was re-examined under the authority of section 60 d, was the attorney for the bankrupt, and an officer of the court which made the re-examination.

A court of bankruptcy is a court of limited and special jurisdiction.

Hull vs. Burr, 153 Fed., 945.

This is not only elementary, but it is made peculiarly apparent by a careful examination of the act creating courts of bankruptcy, with the amendments thereto, because in the act and the amendments the Congress of the United States not only fixes the general jurisdiction in bankruptcy matters, but goes to the extent of carefully defining property jurisdiction and jurisdiction over persons. See sections 2, 23, 60, 67 and 70 of the bankruptcy act of 1898, with amendments.

Section 2 of the bankruptcy act provides:

> "That courts of bankruptcy, as hereinbefore defined, are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, to * * * (subdivision 7) cause the assets of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, *except as herein otherwise provided.*

The exception appearing in subdivision 7 has been held over and over again to refer to section 23 of the act; and in determining the jurisdiction of a bankruptcy court, section 23 has been construed to and must invariably have a controlling effect.

> Hull vs. Burr, 18 A. B. R., 541; 153 Fed., 945.
>
> Bardes vs. Hawarden Bank, 178 U. S., 524.

The decision in the case of Bardes vs. Hawarden Bank, 178 U. S., 524, clearly and conclusively denied the jurisdiction of bankruptcy courts in plenary suits, except by the consent of the proposed defendant. The decision in that case is founded upon section 23 of the original act, and is based upon fundamental principles. It is authority upon the question of jurisdiction in all instances, except where the case made falls clearly within the exceptions of the amendatory act of 1903.

It is well to bear in mind that section 60 of the bankrupt act deals with "*preferred creditors;*" that

such definitive words are incorporated in and made a part of the section (see Bardes vs. Bank, 178 U. S., 524, 534), and that the portion of the act relied upon by the trustee is subdivision d of this same section.

In section 60 Congress was dealing with *creditors,* and *preferred creditors* at that; creditors who had reasonable cause to believe that, by a payment to them, it was intended that they should receive a greater percentage of their debt than other creditors in the same class; creditors who after a preference gave further credit to the bankrupt and creditors preferred by the law itself.

Section 64 b, clause 3, establishes a priority of payment for the fees of the attorney "to the bankrupt in involuntary cases while performing the duties herein prescribed."

In the case In re Habegger, 139 Fed., 123, it was contended by the petitioning trustee that:

> "The legal services provided for in the act, and by section 64 b of the act awarded priority of payment over the demands of other creditors against the estate, or which are permitted to stand as a valid preference under the provisions of section 60 d of the act, when paid by the debtor before contemplated bankruptcy, are such services only as tend to conserve the estate to the creditors, bring it before the court for adjudication and distribution, and other like legal services rendered to the creditors or bankrupt, required or necessary to be done under the terms of the act in carrying out and rendering effective its purpose."

And in the decision by the Circuit Court of Appeals for the Eighth circuit, in that case, the court, speaking through Mr. Justice Pollock, say:

> "From a consideration of the entire act, having in mind the dominant object and purpose is to protect the estate of failing debtors and to distribute it among creditors *pro rata* in proportion to their provable demands, to guard it from preferred creditors and fraudulent grantees, and in the end to provide for the discharge of the honest debtor, we are inclined to agree with the contention made by the trustee, notwithstanding the broad, general language of section 60 d, and for this reason. From an examination of the entire act it will be seen no other or different provision is made respecting the allowance or payment of the general obligations of bankrupts to their attorneys than is made for the payment of other debts of the bankrupt. The method provided by the act for the preservation of the bankrupt estate, the ascertainment of the amount of valid claims against the bankrupt, the value of the assets, the extent and priority of liens thereon, the conversion of the estate into money and its disbursement amongst creditors, preferred and general, the granting of a discharge to the bankrupt, and all other proceedings thereunder, are, in accordance with the provisions of the act, transacted in the bankruptcy court. Of nenessity, such proceedings are conducted in most cases by attorneys employed by the

bankrupt in voluntary cases, or by the creditors in involuntary cases. It is just and equitable such attorneys should be compensated for their services rendered in this behalf out of the assets of the estate, because of the fact that by the filing of a petition in bankruptcy the non-exempt property passes into the control of the court, leaving the bankrupt without means of payment. Hence, the clause of section 64 b, above quoted, in making provision for the payment of debts which have priority, and which must be paid in full before distribution of the estate to the general creditors, makes provision for the compensation of attorneys as therein specified in cases where no contract has been theretofore made with the bankrupt and payment made in advance of the bankruptcy proceedings.

"Again, the act is framed in recognition of the well-known fact that a debtor in contemplation of insolvency and consequent bankruptcy proceedings may be importuned, harassed and annoyed by his creditors seeking to gain an advantage over other creditors by way of preference, fraudulent conveyances, and the like; and in such extremity the bankrupt needs the advice and assistance of counsel to conserve the estate for the benefit of all creditors against spoliation and dissipation, and in the preparation of the petition, schedules and the like papers to confer jurisdiction on the court to take charge of the estate, and, in order to obtain such legal

services in contemplation of bankruptcy proceedings, may make contracts, and will make present payments of money or transfers of property to obtain such services and make payment thereof, which executory contracts, being made by one insolvent and in contemplation of bankruptcy proceedings, would under other provisions of the act be voidable as a preference, unless protected by section 60 d. Therefore such payments of money or transfers of property to an attorney by one contemplating bankruptcy as tend to conserve the estate and bring it before the bankruptcy court for settlement, or other services required by the terms of the bankruptcy act to be performed by the bankrupt, are made valid as a preference under that section, to the extent they are found upon examination to be reasonable and equitable; such claims being in principle entitled to equitable priority, as are claims for services performed or property furnished in the preservation and betterment of an estate controlled and administered by a court of equity. All other claims for legal services are allowable only as a general claim against the estate of the bankrupt in the hands of the trustee. In view of the oft-repeated declarations of courts as to the object and purpose of the national bankruptcy act, as to the advantages accruing to creditors and the debtor, as well by an honest, conservative and expeditious preservation and administration of the estate according to its letter and spirit,

> and as to the many mischiefs sought to be guarded against by its enactment and enforcement, the construction here given section 60 d seems to us to be most in consonance with the purpose sought to be accomplished by the act, as declared by the courts, and as gathered from the several sections of the act construed as a whole, and also to be in harmony with the better reasoned cases bearing upon the subject, as will be seen by reference thereto." (15 Am. B. R., page 203.)

So it is our contention here that sections 60 d and 64 b, clause 3, are to be construed together, and that when so construed the charges to be "approved" under the one or *allowed* under the other are the same.

In re Kross, 96 Fed., 816.

There can be no question but that Congress was dealing with "*parties to the proceeding*" in enacting section 60.

The act makes no provision whatever for the payment of general claims of attorneys in any way except as an ordinary debt of the bankrupt. It is only for services rendered in aid of the bankruptcy proceeding that attorneys are preferred creditors under section 60 to the extent of a reasonable fee, or entitled to priority of payment of such fee under section 64. The reasoning in the case of In Re Habegger, 139 Fed., 123, makes this doubly plain.

An adjudication in bankruptcy is a proceeding *in rem* affecting primarily the estate of the bankrupt, and, secondarily, those interested in it; and all par-

ties having an interest in the *res* are parties to the proceeding. Such parties include the bankrupt, the trustee and all creditors.

Carter vs. Hobbs, 92 Fed., 594.

Southern Loan & Trust Co. vs. Benbow, 3 Am. B. R., 10, 35; —— Fed., ——.

Considering the attorney for the bankrupt rendering services in aid of the bankruptcy proceeding as entitled to priority of payment under section 64 b, if the entire estate was surrendered by the bankrupt, the Congress, of course, included him as a preferred creditor under section 60 d, in the event that he had been so preferred, as matter of fact, by the bankrupt out of the estate before its surrender; and considering that, in rendering services in aid of bankruptcy, the attorney would be before the bar of the bankruptcy court by actual appearance in the proceedings, if not theretofore an officer of such court by virtue of his admission to practice before it, and, hence, directly amenable to its orders and punishable by contempt proceedings for any violation thereof, Congress included in subdivision d of section 60, a power, to the court administering the estate, to pass on the reasonableness of the amount already received by such attorney, which is identical with the power contained in section 64 b, clause 3, in the words "one reasonable attorney's fee, for professional services actually rendered, as the court may allow."

It thus seems clear that the re-examination authorized by section 60 d refers only to the prior payment of *fees* which might later be allowed in whole or in part under section 64 b.

But summary process has been resorted to here for the purpose of bringing from outside the territorial limits of the court, individuals who could not claim fees under section 64 b, for the purpose of trying their title to property in their possession, claimed and denied as a part of the bankrupt estate.

Summary process to settle disputed rights of property is not favored. "This court has steadily set its face against" any extension or enlargement of the well recognized instances for the use of such process.

Eyster vs. Gaff, 91 U. S., 521, 525.
Bardes vs. Bank, 178 U. S., 524, 534.

In the case at bar, Wood & Henderson are not parties to the proceedings in bankruptcy, either as creditors or attorneys of record, they are not officers of the court before which the case is pending, the money or property was paid or transferred to and is held by them in Arkansas outside the district in which the court of bankruptcy sits, and the notice or order to show cause was served on them outside the district.

As was well said by Mr. Justice Sanborn, In Re Rosser, 101 Fed., 567:

> "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected."

The exception in clause 7, section 2, of the bankruptcy act, refers to section 23 (Bardes vs. Hawarden Bank, 178 U. S., 524), and to the extent only that section 23 has been modified by the amendatory act of 1903 has the law of that case been changed.

The general provision for jurisdiction in section 2 is that, "courts of bankruptcy are hereby invested, *within their respective territorial limits* as now established or as they may be hereinafter changed, etc."

The territorial limits of a bankruptcy court are the territorial limits of the United States District Court of the district in which it sits.

It is true that an adjudication in bankruptcy operates to place the property of the bankrupt in the custody of the court making the adjudication, and that such court "collects, marshals, administers, determines priorities of the parties and directs the distribution of the assets." In Re Granite City Bank, 137 Fed., 819. But this rule applies only to "*property of the bankrupt.*" Property in the custody of the law in other jurisdictions, property held and claimed by others, even if claimed as a preference, and property fraudulently transferred by the bankrupt, must be obtained, if at all, by the trustee for the estate, in an orderly manner by a civil action at law or a plenary suit in equity.

Louisville Trust Co. vs. Comingor, 184 U. S., 18.

Bardes vs. Hawarden Bank, 178 U. S., 524, 534.

Jaquith vs. Rowley, 188 U. S., 620; 47 L. Ed., 622.

Here, as in the Comingor case,

> "The proceeding was purely summary. The determination of the merits on the facts was not open to revision by appeal or writ of error under the bankrupt law. If (petitioners) had been entitled to a trial by jury (they) could not have obtained it as of right. The collection of the amounts found due would be enforceable, not by execution, but by commitment.
>
> "We think that it could not have been the intention of congress thus to deprive parties, claiming property of which they were in possession, of the usual processes of the law in defense of their rights."

Louisville Trust Co. vs. Comingor, *supra.*

Marshall vs. Knox, 16 Wall., 556; 21 L. Ed., 484.

Smith vs. Mason, 14 Wall., 419; 20 L. Ed., 748.

The force of the above quotation of undoubted law from the Comingor case is made manifest by an extract from page 29 of the brief filed by the trustee in this case in the Circuit Court of Appeals. It is there said:

> "By the finding of the referee that the payment was made to Wood & Henderson by Williams, in contemplation of bankruptcy, and within four months of the filing of the petition against him, and that the money was

> paid for services to be rendered in contemplation of bankruptcy, Wood & Henderson are forever precluded from claiming that the money was paid them for any other purpose."

Thus, in a proceeding to which they were strangers, conducted in a foreign jurisdiction, "without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights," by "a determination of the merits on the facts" from which there is no appeal, the petitioners are to be "forever precluded" from that inalienable right of property guaranteed them by the Constitution of the United States. We can not believe that such a course of proceedings can be upheld by this court.

From the record it appears that the Colorado referee undertook to, and did, by summary process, try the title to property not only in possession of Wood & Henderson outside the district, but property which was theirs by every law of the land thirty days before the petition in bankruptcy was filed, and which must remain theirs until they are divested of title in a court of competent jurisdiction by due process of law.

It has been settled law ever since the case of Toland vs. Sprague, 12 Peters (U. S.), 300, that United States courts have no power, in personal actions, to serve the process of subpoena, by which said actions are commenced, outside the district for which the court was created and in which it sits.

We think we have demonstrated that there is no special grant of jurisdiction in the bankruptcy act

which will justify the use made of summary process, and that the first question propounded by the Circuit Court of Appeals should be answered in the negative.

SECOND QUESTION.

> "If a District Court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counsellor outside of the district of the court of bankruptcy, such attorney or counsellor being non-resident of the district in which the proceedings in bankruptcy are pending?"

As has already been stated, a court of bankruptcy is a court of limited and special jurisdiction.

Section 2 of the bankruptcy act limits the territorial jurisdiction of bankruptcy courts to the established geographical boundaries of the courts designated as the courts of bankruptcy. Clause 1 of section 2 still further limits their jurisdiction by excluding them from power to adjudge bankrupt any person who has not had his principal place of business, resided or had his domicile within such territorial limits for the greater portion of the preceding six months.

Thus, while it is true that once the jurisdiction of a bankruptcy court attaches, it has jurisdiction of the *res*, the estate in bankruptcy, yet the law makers were careful to insure *due process of law*, by making certain the jurisdiction over the person in the first

instance. The only exception made is in cases of non-residents of the United States having property within the jurisdiction of the court making the adjudication.

In the case of Bardes vs. Hawarden Bank, this court reaffirmed the doctrine laid down by Mr. Justice Miller in Eyster vs. Gaff, 91 U. S., 521, 525, in the following words:

> "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court, which has so adjudged, draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary."

Even if the District Court sitting in bankruptcy has jurisdiction to re-examine such a transaction as took place betwen the bankrupt and petitioners, such jurisdiction must be exercised in an orderly manner and with due regard to practice, form and precedent. A summary proceeding, orders in which may only be enforced by process for contempt, necessarily presupposes clear and unquestioned jurisdiction over the person affected by the proceeding; and where, as here, the persons affected are not in any manner parties to the proceeding, have never in any way appeared therein and are non-residents of the district in which the court sits, summary process fails and resort must be had to a civil action at law or a plenary suit in equity.

It is no answer to say that if the court has jurisdiction to re-examine, that is, jurisdiction of the subject-matter, it has jurisdiction to reach beyond its territorial limits and bring in, by the mere service of notice, parties who could not be brought in by process of subpoena in a plenary suit. Jurisdiction of the subject-matter does not give jurisdiction of the person—else the distinction between actions local and transitory would long since have disappeared.

In Jaquith vs. Rowley, 188 U. S., 620, 47 L. Ed., 622, this court say:

> "The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the proceedings in

bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. To extend such a jurisdiction over an adverse claimant would be within the prohibition of section 23, a and b, whether such jurisdiction were exerted by an action strictly so called or by a summary application to the court in bankruptcy. *It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial.* * * * It is not necessary, in order to be an adverse claimant, that the surety should claim to be the absolute owner of the property in his possession. It is sufficient, if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond, and that liability had not been determined and satisfied. *If the trustee desires to test the question of the right of the surety to retain the money, he must do so in accordance with the provisions of the section of the bankrupt law above referred to.*"

It appears, from the certificate, that the property "*was transferred*" before the petition in bankruptcy was filed, and such transfer makes adverse claimants of the petitioners under the ruling in Jaquith vs. Rowley, *supra,* and if the trustee desires to test their rights, he must do so in accordance with the provisions of section 23. The rule has not been changed by the amendatory act of 1903. If the case made

falls within section 60 b or 67 e, the bankruptcy court has jurisdiction of the subject-matter; if it falls under section 70 e, the case of Bardes vs. Hawarden Bank controls; in any event, the process of subpœna or summons must be regularly served.

In Jaquith vs. Rowley and in Louisville vs. Comingor the fund in question was within the territorial confines of the bankruptcy court, and personal service of the citation was had upon the persons affected within and not without the district, and in both those cases jurisdiction by summary process was denied. In the case here presented the property in question *"was transferred"* outside the district, before the petition in bankruptcy was filed, and neither it nor Wood & Henderson, who claim it adversely, have ever been within the district. Even if jurisdiction to re-examine this particular transaction under section 60 d was conceded as to the subject-matter, we think, under the authorities, the exercise of such jurisdiction by service of a mere order and citation to show cause outside the district must be denied.

III.

THIRD QUESTION.

> "May a plenary suit instituted by the trustee in bankruptcy against such attorney or counsellor in the District Court, where the estate in bankruptcy is being administered, be maintained upon service of process upon the attorney or counsellor, who is a non-resident of the district, outside of that district?"

Again we direct attention to the fact that it is now settled that the words "herein otherwise provided," in subdivision 7, of section 2, of the bankruptcy act, refer to section 23 of the act.

> "The general scope and object of which, as indicated by its title, are to define the 'Jurisdiction of United States and State Courts' in the premises."

In Bardes vs. Hawarden Bank, 178 U. S., 524, this court say:

> "Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant.'"
>
> "This limitation is general in its terms embracing all suits. Congress, by the amendment of 1903, excepted from this limitation certain suits which may now be brought in the bankruptcy courts without the consent of the defendant. The suits excepted are 'suits for the recovery of property, under section 60, sub-division b, and section 67, sub-division e.' The statute re-

quiring 'the consent of the proposed defendant' stands as enacted, with no other exception than the one named."

Hull vs. Burr, 18 Am. R. R., 541, 547; 153 Fed., 945.

Gregory vs. Atkinson, 127 Fed., 183, 185.

Prior to the amendment of 1903 a plenary suit by the trustee against Wood & Henderson in the District Court for the District of Colorado would have been impossible *without consent,* under the decision in Bardes vs. Bank; and it is equally impossible now, unless such suit clearly falls within one of the *two* classes, concerning which the jurisdiction of courts of bankruptcy has been enlarged by the amendment.

Clearly such a suit would not be a suit to avoid a preference under section 60, sub-division b; neither could it be considered an action to recover property transferred with intent to hinder, delay or defraud creditors under section 67, subdivision e. Rather would it be an action by the trustee to avoid a transfer by the bankrupt, which might have been avoided by any creditor had not bankruptcy intervened, and falling within the provisions of section 70 e.

The amendatory act as passed by congress leaves suits under section 70, subdivision e, still subject to the original limitation of section 23, subdivision b.

"Construing section 70 e (as amended) in connection with section 23 b, it appears that the former conferred jurisdiction on courts of bankruptcy of suits to avoid trans-

fers of his property made by the bankrupt which any creditor of the bankrupt might have avoided, but that, although jurisdiction of the subject-matter is conferred, it can only be exercised over the persons of the defendants by their consent."

Hull vs. Burr, 153 Fed., 945.

Gregory vs. Atkinson, 127 Fed., 183, 185.

Assuming that the *Third Question* is based upon the facts set forth in the *First Question,* we are led at once to the inquiry—"Would such a suit fall within the provisions of section 60, subdivision b, or section 67, subdivision e?" If not, then it is clearly precluded by the decision in *Bardes vs. Hawarden Bank.*

A preferred creditor is defined by section 60, in effect and almost in words, to be *a person who has received from the bankrupt a transfer of property which will enable him to obtain a greater percentage of his debt than any other creditor of the same class.* This presupposes the existence of the relation of debtor and creditor, is not compatible with the facts set forth in the record and in the First Question, for it there appears, that the property *"was transferred* for services to be rendered," and, therefore, that there was no antecedent consideration implying the pre-existence of the relation of debtor and creditor. The conclusion, then, that such a suit would not fall within section 60, subdivision b, seems to be inevitable. Manifestly the record does not disclose a state of facts showing a transfer with intent to hinder, delay or defraud creditors, and the pursuit of a remedy under section 67 e is not open to the trustee.

We believe that, under the authorities, the answer to Question Three must be: *Not unless the case made comes clearly within the provisions of either section 60 b or section 67 e.*

Under the facts here presented it appears that the bankrupt *transferred* certain property to Wood & Henderson thirty days before a petition was filed against him in bankruptcy, at a time when, so far as the parties to the transaction were concerned, his right of property was absolute and the title he gave good.

If Wood & Henderson were then creditors, and were thereby preferred; if there was an intent to hinder, delay or defraud creditors, or if the transfer was fraudulent as to creditors of the bankrupt, the bankruptcy act affords a remedy.

The mere fact that Wood & Henderson happen to be attorneys at law by profession does not give a court of bankruptcy, before which they have never appeared, and of which they are not officers, in an action to which they are not parties, the right to summarily deal with property in their possession, title to which rested in them absolutely, until divested by a court of competent jurisdiction, in an action regularly instituted, and after "a course of legal proceedings according to those rules and forms which have been established for the protection of private rights."

To characterize the proceedings before the referee as inquisitorial would be drawing it mildly.

No more arbitrary or tyrannical method of procedure than that pursued here can well be imagined; no clearer example of the violation of a constitutional right by the confiscation of private property, without due process of law, can be found in the books, and if

the determination of the referee is to be allowed to stand, the sanctity of judicial precedent and tradition must be violated, the spirit and intent must be sacrificed to technical expression, and American jurisprudence will rest upon a new and hitherto unknown basic principle.

Respectfully submitted,

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GEORGE L. NYE,
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In the Supreme Court of the United States.

October Term, 1907.

No. 167.

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, Petitioners.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

HARVEY RIDDELL,
Attorney for Wilbur F. Denious,
Trustee, Respondent.

Smith-Brooks Printing Co., Denver.

In the Supreme Court of the United States.

October Term, 1907.

No. 167.

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

STATEMENT.

Counsel for petitioners, Wood & Henderson, allege or assume in their brief certain facts which are neither disclosed by the certificate nor by the record of this proceeding in the Circuit Court of Appeals. It would probably be preferable to decide the questions certified on the certificate, or have the entire record certified to this court. One fact assumed by counsel, which neither the certificate nor record dis-

closes, is that Wood & Henderson have or make an adverse claim to the fund in question. It has been held by this court that the fact that the party who has possession of property claimed by the trustee refuses to surrender it, and contests the jurisdiction of the court to compel him to do so, as is being done by these petitioners, does not show such an adverse claim as will oust the bankruptcy court of jurisdiction, and if that is true then there is no foundation for counsel's statement that the petitioners make an adverse claim to the fund in question.

Mueller vs. Nugent, 184 U. S., 1.

Another fact assumed by petitioners, which does not appear in the certificate nor in the record of this proceeding in any court, is that the allowance made Wood & Henderson was not for services performed by them in preserving or collecting the assets of the bankruptcy estate.

It should be remembered that the petitioners have offered no testimony whatever in this proceeding, and that no objection has been made to the sufficiency of the petition of the trustee upon which the proceeding is based, nor to the sufficiency of the showing made by the trustee before the bankruptcy court. In seeking correct answers to the questions certified by the Circuit Court of Appeals, therefore, we may assume that a proper and sufficient petition was filed in this proceeding under section 60d, and that thereupon the bankruptcy court made an order requiring Wood & Henderson to appear and show cause, if any they had, why an order should not be made and entered determining the reasonable value of the services rendered and contem-

plated to be rendered by the said Wood & Henderson, as attorneys and counsellors, and notifying them that in default of their appearance the court would hear and determine said matter on the evidence presented by the trustee, and that a copy of the petition and order to show cause should be served on said Wood & Henderson at least twenty days before the hearing; that on the day set for the hearing Wood & Henderson did not appear either in person or by counsel, the court proceeded to re-examine the transaction set out in the petition, and found that Wood & Henderson had been properly served with the petition and order, and that the evidence showed such a transaction as comes within the provisions of section 60d, and made the order set out in the certificate, finding the value of the services rendered, and directing the trustee to recover the balance of the fund in the hands of Wood & Henderson. It should be remembered that Wood & Henderson did not assert before the Bankruptcy Court, as they are attempting to assert in this court, that they were not officers of the court, or that they made an adverse claim to the fund in question. Whether the bankruptcy court could have proceeded in this matter if Wood & Henderson had appeared and asserted a claim to the fund in question; whether the petition of the trustee was sufficient; whether the showing made before the bankruptcy court was sufficient, and whether the allowance made by the court to Wood & Henderson was for services rendered in preserving or collecting the estate, or in other matters—these are questions not involved here, and the discussion of them in counsel's brief would seem to be uncalled for.

ARGUMENT.

Question One.

We assume that it will not be disputed that a court of bankruptcy, in which the proceedings in bankruptcy are pending, would have jurisdiction under section 60d of the bankrupt act to re-examine on petition of the trustee such a transaction as is detailed in question one, in the instance where such attorney or counsellor at law, at the time of receiving such payment or property, and at the time of the proceedings in question, was a *resident* of the state or of the district in which the bankruptcy court instituting such inquiry is located, and where the money or property was so paid to and is held by such attorney or counsellor *within* the district in which such court of bankruptcy sits, and the order to show cause, citation or notice of the proposed hearing is served upon him *within* the district in which such court of bankruptcy sits. The conditions enumerated in question one, which are particularly pertinent here, are, therefore, the following:

1. "Where such attorney or counsellor at the time of receiving such payment or property, and at the time of the proceedings in question, was a *non-resident* of the state or of the district in which the bankrupt court instituting such inquiry is located."

2. "Where the money or property was so paid to, and is held by, such attorney or counsellor *outside* of the district in which such court of bankruptcy sits."

3. Where "the order to show cause, citation or notice of the proposed hearing is served upon him *without* and not within the district in which such court of bankruptcy sits."

These conditions raise the questions of jurisdiction of the bankruptcy court over the subject matter of this proceeding and of the persons of petitioners, which questions will be considered together.

The legal principles and reasons on which the jurisdiction of courts of bankruptcy rests, we believe have been misconceived by the petitioners. The challenge of jurisdiction because the petitioners are nonresidents of the state or district in which the bankruptcy court instituting this proceeding is located, and because the money was paid to petitioners and is held by them outside of the district in which such court of bankruptcy sits, and because the order to show cause, citation or notice of the proposed hearing was served upon petitioners without the district in which such bankruptcy court sits, is, we believe, contrary to the authorities and the spirit and purpose of the bankruptcy law. If this proceeding involved a controversy *at law or in equity*, as distinguished from a *proceeding in bankruptcy*, and if the United States courts sitting in bankruptcy were governed by the same statutory rules as when sitting simply as District Courts, the arguments and authorities of petitioners would be entitled to some consideration, but they are not pertinent to this proceeding.

The act of congress of July 1, 1898, creates bankruptcy courts with a jurisdiction separate and dis-

tinct from any and all other federal courts. While sitting in bankruptcy, the District Courts of the United States exercise a distinct jurisdiction different from that which they exercise while sitting as ordinary District Courts or Admiralty Courts. If congress had created courts of bankruptcy instead of availing itself of the District Court to administer the law, no one would think of measuring the jurisdiction of such bankruptcy courts by the law governing the jurisdiction of District Courts; yet District Courts sitting in bankruptcy exercise a jurisdiction as distinct from District Courts as such, as the jurisdiction of bankruptcy courts is distinct from Circuit or Admiralty Courts. By the bankrupt act, courts of bankruptcy are given exclusive jurisdiction to "cause the estate of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided" (section two, subdivision 7), and to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act" (section two, subdivision 15).

The exception in subdivision 7, "as herein otherwise provided," can not avail petitioners, because there is no provision in the act relating to the reexamination of transactions between attorneys and their clients, paying them money "in contemplation of bankruptcy" other than that contained in section 60d. And the rule that a trustee must resort to a plenary suit where the money or property is in the possession of a third person claiming adversely to the trustee, can not be invoked now (1) because there is no adverse claim made, and (2) because the express grant

of power in this provision of the bankruptcy act is to examine transactions in which the money is in the possession of and claimed adversely by the attorney. And the closing words of this subdivision, "and the excess may be recovered by the trustee for the benefit of the estate," renders it certain that the intent was to confer on the bankruptcy court power to re-examine summarily the transaction and determine the rights to the money and property held in possession by such attorney even under claim of adverse interest.

Section 60d of the act provides that "the transaction shall be re-examined by the court on the petition of the trustee or any creditor," and by subdivision 7 of section 1 "court" means "the court of bankruptcy in which the proceedings are pending, and may include the referee." The words "the court," as used in section 60d, therefore mean "the court of bankruptcy in which the proceedings are pending;" that is, the court of bankruptcy making the adjudication, and the grant of power being to that particular court, no other bankruptcy or District Court can exercise the jurisdiction. It has been, in effect, so held.

Furth vs. Stahl, 55 Atlantic, 29, 30.
Swartz vs. Frank, 183 Mo., 438, 444.

Furthermore, this section makes this a proceeding to "cause the estate of bankrupts to be collected," and to "determine controversies in relation thereto," within the purview of section 2, subdivision 7, as certainly as if specific reference were made to said subdivision 7.

In Furth vs. Stahl and Swartz vs. Frank, supra, it was held, in effect, not only that no court, except the bankruptcy court making the adjudication, had jurisdiction to re-examine the transaction, but also that no excess could be recovered by the trustee, unless the bankruptcy court had determined that the amount paid the attorney was unreasonable, and had determined what was a reasonable amount to be allowed the attorney and directed a recovery of the excess.

The Missouri court, after showing the payment to an attorney for services to be rendered is not an unlawful preference until adjudged to be unreasonable by the bankruptcy court, said:

> "No attempt is shown to have the federal court—meaning the federal court that made the adjudication—review the amount so paid, and the state courts have no jurisdiction to do so."

The view taken by the courts in these cases seems to be that, in the absence of a re-examination of the transaction by the bankruptcy court making the adjudication, the payment is conclusively reasonable, and is a preferred claim, and can not be recovered, even in a plenary suit. We believe this view is correct and can not be successfully controverted. The statute makes the re-examination in such case a necessary step in the administration of the estate, and it is therefore an administrative *proceeding in bankruptcy*, which, by the plain intendment of the section, saying that it shall be upon petition of the trustee or any creditor, is summary in its nature, to be had

upon due notice, as any other administrative proceeding.

No contention is made, and we believe no reasonable contention could be made, that congress would not have the constitutional power to grant to the bankruptcy court jurisdiction to determine the trustee's title to property, which some third person had obtained from the bankrupt within four months prior to the filing of the petition, and claimed adverse title thereto. The reason a bankruptcy court has not that power is because congress has not attempted to grant it. And no contention is made, or could be made, that congress has not the constitutional power to give a court of bankruptcy the jurisdiction which, we contend, it has under section 60d. But petitioners argue that courts of bankruptcy have not the power in the summary proceeding to take property from a third person, who claims title and possession adverse to the trustee, and that for the same reason they have no power to exercise the summary jurisdiction, under section 60d, of re-examining transactions between attorneys and clients, where the attorney claims adverse possession. But this reasoning is not sound, both because, under section 60d, no attempt is made to deprive the adverse claimant of the possession of the property, and because, by the very terms of section 60d, the court of bankruptcy is given the express power to re-examine a transaction in which the title and possession are held adversely.

But it is now the settled law that a bankruptcy court, without any express power, but simply by virtue of its general power to administer bankrupt estates, has jurisdiction summarily to determine whether a third person has any actual basis for his

claim of title. And if upon examination of the facts the bankruptcy court determines that the claim of such person is not bona fide or is colorable only, then it has jurisdiction to order the money or property to which such adverse claim is made, paid or delivered to the trustee.

Bryan vs. Bernheimer, 181 U. S., 188.
Mueller vs. Nugent, 184 U. S., 1.
In re Muncie Pulp Co., 139 Fed., 546.

And the finding which the bankruptcy court is authorized to make, and which it did make in this proceeding under section 60d, is analogous to the finding which it has jurisdiction to make under the ruling in Bryan vs. Bernheimer, and subsequent cases, where the property is in the possession of a third person claiming title and possession adverse to the trustee.

The plea of an attorney when served with an order to show cause under section 60d that the money was not paid him by the bankrupt "in contemplation of bankruptcy," and that the money was not paid to him for services "to be rendered," or that the service for which the money was paid was not within the purview of section 60d, is analogous to the plea of adverse title and possession discussed in the foregoing decisions. But the petitioners made no such plea, and they are in the same position that the petitioners were in in the case In re Granite City Bank, 137 Fed., 181, that is, they, in effect, concede the facts to be as averred in the trustee's petition filed in the bankruptcy court and challenge the jurisdic-

tion of the bankruptcy court to examine the transaction under section 60d.

And the finding of the referee that the money was paid by the bankrupt "in contemplation of bankruptcy" and for services "to be rendered," within the purview of section 60d, vests the court with jurisdiction to determine the reasonable amount to be allowed the attorney and order the trustee to recover the balance, just as the finding that an adverse claim is fraudulently made and is colorable only vests the court with jurisdiction to order summarily such third person to pay over to the trustee. In each instance the court has the right to find the jurisdictional facts. That the court's decision is wrong, if it is wrong, does not affect its jurisdiction. The power to decide right carries with it the power to decide wrong.

The Supreme Court of Missouri, in discussing the jurisdiction of the justice of the peace, said:

> "His jurisdiction to decide contrary to law was just as great as to decide in conformity with law. His power to decide right necessarily included the power to decide wrong. Error does not diminish jurisdiction. There is a broad and turnpike-like distinction between the existence of jurisdiction and its mere exercise."
>
> Howland vs. Railroad Co., 134 Mo., 474, 479.

The filing of the petition setting forth facts sufficient to bring the controversy within the purview of section 60d, and service of notice, gave the referee

jurisdiction to decide whether such facts were true, and such finding is conclusive until reversed by some higher tribunal.

> Freeman on Judgments (4th edition), section 135.

It is plain that no court, except the bankruptcy court making the adjudication, has jurisdiction to review a transaction coming within the ban of section 60d, and if, as petitioners contend, no review of such transaction can be had, unless the attorneys can be served within the territorial jurisdiction of the District Court making the adjudication, then a method has been discovered whereby a dishonest debtor can defeat the distribution of his estate among his creditors, and can laugh at the puny power of all bankruptcy courts and their proceedings.

The jurisdiction of the bankruptcy court in a matter of this kind is so plainly stated in section 60d that, so far as we have been able to find, it has never before been challenged, except in one case. In the case of In re Lewin, 103 Fed., 850, a similar petition was filed by the trustees, and the facts in that case, as shown by the opinion, were as follows:

> "That the petition was shown by the referee to one of the attorneys before the reference; that ten days' notice was given by the referee by mail (all in the same village) to the attorneys and the trustee, after the reference, of the reference and the time and place of hearing; that the attorneys, by mail, required of the referee 'a copy of the complaint and order of court,' and were by mail

informed that the petition was the one examined before by one of them, which they could have, to examine, at any time they should wish to call for it; that one of the attorneys appeared at the hearing, denying the jurisdiction of the court, and suggesting in writing that the report show that no copy of the petition was ever given to any member of the firm of attorneys; that the evidence be sent up with any finding that might be made, and that the purpose of the suggestions was to avoid any admission of jurisdiction. The referee complied with these suggestions."

Upon this state of facts the court had the following to say in reference to the jurisdiction of the bankruptcy court over the subject-matter and parties:

"The matter has now been heard upon the report, and the principal points made by the attorneys are as to the jurisdiction of the court, and the sufficiency of the notice of the hearing before the referee; and the case of Bardes vs. Bank, 175 U. S., 526, is especially relied upon as to the general jurisdiction of the court, and that of In re Rosser (C. C. A.), 4 Am. Bankr. R., 153; 101 Fed., 562, as to the regularity of the proceedings. The decision in Bardes vs. Bank, however, was as to the effect of clause 'b' of section 23 of the act, limiting the place of bringing suits by the trustee, and does not appear to have any appli-

cation to such proceedings as these, in which a re-examination of such transactions as that here in question is not only authorized, but expressly required, on such a petition as the one by which this proceeding was moved. This is not a suit such as is mentioned in that clause of section 23, but is an *administrative proceeding,* of which the bankruptcy court has express jurisdiction, given by this clause 'd' of section 60, if it would not have any by the general grant of jurisdiction over bankrupts and their estates, and of their attorneys in the proceedings, as officers of the court. This specific provision seems rather to have been intended for requiring specific vigilance in this quarter, and for providing for a recovery of any excess from the attorneys, than for any special grant of jurisdiction, which, however, it plainly gives. The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in Rosser's case, cited. He says, at page 159, Am. Bankr. R., and page 567, 101 Fed.:

" 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.'

> "There the proceedings against the bankrupt for contempt were held bad because no such course of proceedings was taken or notice given. Here the course of proceedings was by petition of the trustee, as the statute provides, and which fully sets forth the claim made and the relief sought. The notice of it was official, from the referee having the powers of the court in this respect given by law."

As plainly pointed out in the above case, this is not a *suit* brought by the trustee to obtain a judgment or to recover assets belonging to the estate, but "is an *administrative proceeding*, of which the bankruptcy court has express jurisdiction given by this clause 'd' of section 60." If a suit it could be instituted by the trustee alone, but by the terms of the act this proceeding may be instituted either by the trustee or any creditor. It is plain that it is simply an administrative proceeding to be instituted in the bankruptcy court. It being an administrative proceeding, no process is required, but notice to the interested parties is all that is necessary. If only notice is necessary, then it makes no difference about the residence or location of the parties or the place where the notice is served, provided the parties be given notice in time to appear and be heard. In this case there is, and can be, no claim made that there was not ample notice and opportunity to be heard.

In the Granite City Bank case, supra, the petitioners objected to the jurisdiction of the court for these specific reasons, viz.:

(1) "That neither the property referred to, nor the said Granite City Bank, is within the territorial limits over which the court has jurisdiction."

(2) "That no notice of the hearing upon the petition had been served upon the Granite City Bank within the territorial jurisdiction of the court."

(3) "That the court had no jurisdiction over the said Granite City Bank, and, without personal service upon the said Granite City Bank within the jurisdiction of the court, it had no jurisdiction of the subject-matter, to wit, the lien of said bank upon said personal property, said property being without the territorial limits over which the court has jurisdiction."

(4) "That the court is given no jurisdiction by the bankrupt act to order the sale of the property free from liens without first determining in some proper proceeding the validity of such liens."

See

137 Fed., page 819.

All of these objections were overruled by the referee, and his ruling, taking jurisdiction, was sustained by the court. It is there said (page 822):

"Counsel for the bank seem strangely affected with notions about state lines under the bankrupt act. They challenge the right to reach the bank in South Dakota by notice sent out by the referee in Iowa, and the right of the court of bankruptcy in Iowa to

draw the bank from its residence in South Dakota to determine its rights as a preferred mortgagee. Under the scheme of the bankrupt act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds pari passu among the creditors, according to their respective rights and priorities. Only one court—the court making the adjudication—collects, marshalls, administers, determines priorities of the parties, and directs the distribution of the assets. The bank could have appeared and contested at its pleasure the propriety of the referee ordering the sale of the property free from all liens, and the District Court of Iowa, and it alone, could pass upon the validity of the bank's claim to the proceeds of the sale of the property."

In re Granite City Bank, 137 Fed., 818.

PETITIONERS' ARGUMENT NOT APPLICABLE.

Taking up, now, the argument in the brief of petitioners on question one, as near as we are able to analyze the argument, we find the following propositions advanced by counsel:

1. That courts of bankruptcy are courts of limited jurisdiction.

2. That section 60d deals with preferred creditors and their claims, and that, as shown by the case In re Habegger, 139 Fed., 623, upon the re-examination of a transaction, such as set out in the petition in this proceeding, the bankruptcy court must make the attorney an allowance only for such services rendered as have been beneficial to the estate, and declare the transaction entirely void, except to the extent of the value of such services, thus construing sections 64b and 60d in connection with each other.

3. A transaction such as is described in section 60d can not be dealt with in a proceeding in bankruptcy—that is, in a proceeding in the bankruptcy court—but can only be adjusted by means of a plenary suit.

We shall discuss these propositions in the above order.

1. We agree with counsel that courts of bankruptcy are courts of limited jurisdiction; but this question becomes immaterial when we are considering the jurisdiction exercised by virtue of an *express* provision of the statute, as distinguished from their *general* powers under the statute. Where the jurisdiction is expressly conferred, then we are not concerned as to whether the court is a court of general or limited jurisdiction, the only question being whether the legislative branch of the government, which enacted the law, had the constitutional power to confer such jurisdiction. But no question is raised as to the constitutional power of congress to confer upon bankruptcy courts the jurisdiction which, we contend, they have under section 60d. It is conceded that congress has supreme and unlimited power in the matter of bankruptcy legislation. Whether the

courts of bankruptcy are courts of general or limited jurisdiction is therefore immaterial, since it has the jurisdiction which we contend for, if at all, under an express grant of power.

2. Counsel's second proposition is, as it seems to us, against, rather than in favor, of the position taken by them in this proceeding. They say, on page 6 of their brief, that section 60 deals with preferred creditors, and later in their brief (page 11) they say the parties to a bankruptcy proceeding "include the bankrupt, the trustee and all creditors." Again we agree with counsel. In the Habegger case, a case relied upon by them, the attorney to the transaction, which was re-examined by the bankruptcy court, is treated and called a "preferred creditor" by the court in its opinion. We contend that an attorney whose transaction with a bankrupt comes within section 60d is as much a party to the bankruptcy proceeding as a physician in another state, who has performed professional services for the bankrupt and is scheduled as a creditor. Each must submit to the finding of the bankruptcy court as to the value of the services rendered by him. But in this connection counsel argue that when a transaction is re-examined under section 60d, the bankruptcy court must hold the transaction void, except as to those services rendered which were beneficial to the estate. This proposition is based upon the decision in In re Habegger, supra. It is true the court in that case held that, upon a re-examination of a transaction within the provisions of section 60d, the bankruptcy court could declare the attorney a preferred creditor only to the extent of the value of the services rendered, which were beneficial to the estate, and the transaction in excess

thereof should be declared void. It seems to us that if congress intended that in a proceeding under section 60d the bankruptcy court should allow the attorney only for services rendered beneficial to the estate, then the words "solicitor in equity and proctor in admiralty" would not have been used in this section.

Pratt vs. Bothe, 130 Fed., 670, 673.

But it should be noticed that the court did not, in the Habegger case, hold that the bankruptcy court did not have jurisdiction to re-examine such a transaction *unless* a part of the services rendered by the attorney were beneficial to the estate. In fact, in that very case it was found that none of the services of Attorney Fowler were beneficial to the estate, but still the court held that it was proper for the transaction to be re-examined by the bankruptcy court, upon the petition of the trustee, and that the prayer of the petition should have been granted. That case, therefore, goes merely to show the extent the attorney is to be declared a preferred creditor, and does not attempt to limit the jurisdiction of the bankruptcy court to re-examine such transactions to cases where the services rendered were beneficial to the estate, and deny jurisdiction in cases where the services rendered were not beneficial to the estate. Besides, if the jurisdiction of the bankruptcy court in this proceeding depended upon the character of the services for which petitioners were allowed the sum of $800 in this proceeding, the bankruptcy court must be held to have had jurisdiction, because the evidence offered in this proceeding, and upon which the court made petitioners, as preferred creditors, an allowance of

$800, is not before this court, was not before the Circuit Court of Appeals, and is not a matter for consideration here.

3. On page 22 of petitioners' brief, counsel frankly take the position that the facts upon which this proceeding is based could not be the basis of a suit to avoid a preference under section 60, subdivision b, nor be made the basis of an action to recover property transferred to hinder, delay, or defraud creditors under section 67, subdivision e, and in this we believe counsel are correct. But when we come to examine the argument made by counsel in which they attempt to show that this proceeding can not be maintained, we find that their entire argument is based upon the opinions of this court and other courts in cases which were brought under these particular provisions of the bankruptcy act, namely, section 60b and section 67e. Here, then, is the fallacy of their entire argument. They admit, as they must admit, that the facts in this proceeding do not make a case under those provisions of the act, and yet they insist that this proceeding is wrong because it does not conform to the practice which is laid down for cases which do come within those particular provisions of the bankruptcy law. The summary jurisdiction which a bankruptcy court may exercise in cases under section 60b and section 67e is, by virtue of the general powers given it by the bankruptcy act, to administer the estate. But the summary jurisdiction which is exercised in this proceeding by the bankruptcy court is by virtue of an express provision giving it such power.

Counsel say that by section 2, subdivision 7 of the act, courts of bankruptcy are given the power to "cause the estates of bankrupts to be collected, re-

duced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided," but that the clause, "except as herein otherwise provided," refers to section 23, by which the trustee is relegated to a plenary suit, and that this transaction can not, therefore, be re-examined in a proceeding in the bankruptcy court. When we come to examine the act, however, we find an express provision, section 60d, giving the court of bankruptcy express power to re-examine a transaction such as was set out in the petition in this proceeding, and providing that it shall be re-examined by the court upon the petition of the trustee or any creditor, thus providing clearly and expressly that such a transaction shall be re-examined in a proceeding in the bankruptcy court itself. But, is the language of section 23 so much in conflict with section 60d that both sections can not be upheld, and must section 23 be allowed to stand and be given effect, and section 60d fall and be disregarded? The language of section 23 is that "the United States Circuit Courts shall have jurisdiction in all controversies, *at law and in equity,* as distinguished from *proceedings in bankruptcy,*" etc. There certainly is no conflict between this section and section 60d, for the latter expressly provides that such transactions shall be re-examined by the "court," meaning the "court of bankruptcy," and that such re-examination shall be had upon the petition of the trustee or any creditor, clearly making such a re-examination a *proceeding in bankruptcy* as distinguished from a controversy *at law or in equity.*

It seems to us counsel are willing to discuss anything in their brief except the plain and express terms of section 60d. They say they ought not to be

deprived of their title to their property in such a proceeding as this; that they ought not to be bound by the judgment of the bankruptcy court, which can not be reviewed, and from which they have no appeal, and to disobey which will put them in contempt of court. But, are they deprived of any of their property by the decision of the bankruptcy court in this proceeding? Has the bankruptcy court entered any judgment which it may attempt to enforce against petitioners by means of execution, contempt proceedings, or otherwise? The only effect of the order entered by the bankruptcy court is to find the value of certain services which the petitioners rendered the bankrupt, and to declare the petitioners preferred creditors of the bankrupt estate to that extent. They have been deprived of no more rights than the physician who has rendered services for the bankrupt and his family, which he considers worth $200, but is allowed $100 only. These propositions are so plain that further discussion of them is unnecessary.

THE PURPOSE OF SECTION 60d.

It is true that the provisions of section 60d differ from the other provisions of section 60, in that they relate to a transfer for a particular purpose, transfers to particular classes of persons, and in addition prescribes a special proceeding to be resorted to in the bankruptcy court by the trustee, or any creditor, before the trustee can attempt the recovery of the balance of the money thus transferred. Congress d[illegible] not, as in the former subdivisions of the

section, make it a condition precedent to a recovery, that the transaction occurred within four months of the filing of the petition, nor that the attorney and counsellor at law, solicitor in equity, or proctor in admiralty, knew, or had reasonable cause to know, that the money or property was transferred to him as a prefrence; but congress had the constitutional power to do this, and many reasons may be suggested why this special provision for this particular class of transfers to particular classes of individuals was deemed wise by congress.

1. The clases of individuals enumerated, namely, attorneys and counsellors at law, solicitors in equity, and proctors in admiralty, are usually paid for their services, either in whole or in part, in advance. This is not true of transactions with doctors or merchants, for instance, and such a provision with reference to them would, therefore, be unnecessary.

2. Where an insolvent is in fear of an involuntary petition being filed against him, he naturally resents it and is likely to attempt to defeat it and to prefer to sacrifice a large, or even the greater part of his assets in attorney fees rather than submit to involuntary bankruptcy. The attorney is unwilling to be engaged unless he is paid in advance, and the insolvent is liberal with the assets which under the bankrupt law really belong to his creditors. If the proceeding is a voluntary one, the insolvent may desire to accomplish certain results in the course of the bankruptcy proceedings, and before the filing of the petition, being desirous of providing himself with attorneys, he is willing to pay them a handsome retainer for services to be rendered in the future.

For these reasons and others that might be mentioned, congress has made this special provision in regard to the payment of money or the transfer of property to attorneys and counsellors at law, solicitors in equity, and proctors in admiralty, for services to be rendered by one who contemplates the filing of a petition by or against him. Without this provision, is there any reason why an insolvent might not go to an attorney, ignorant of his insolvent condition, and pay him a handsome retainer for services to be rendered in the future, and virtually place the principal part of his estate in the hands of attorneys and beyond the reach of the bankruptcy court? Could an attorney, who had entered into such a contract in good faith, who stood ready to perform it, or had partially performed it, and had put himself in a position where he would not, and could not, be employed by others, be required to surrender to the bankrupt's estate the retainer which had thus been paid him, if the bankrupt act did not contain this provision? Money paid under such circumstances could not be recovered under section 67e or 70e, because the attorney would be a bona fide holder and for a present consideration, and because, in addition to agreeing to perform the services, he had placed himself in a position where he could not and would not be employed by others.

The purpose of this provision is, therefore, plain, but whether it is wise or necessary we need not inquire. Congress had ample power to give the bankruptcy courts jurisdiction to re-examine such transactions, in an administrative proceeding, in that particular court, and it has conferred that power in terms too plain to be construed away.

PETITIONERS ARE CREDITORS.

We believe the authorities we have cited, taken in connection with the plain terms of the statute itself, clearly demonstrate that Question One must be answered in the affirmative. A line of reasoning to which petitioners are, we believe, committed in their brief, also seems to lead inevitably to the same result.

In their brief, counsel clearly point out that an attorney who is a party to a transaction which is covered by the provisions of section 60d, is a preferred creditor. Counsel say:

> "It is well to bear in mind that section 60 of the bankrupt act deals with 'preferred creditors;' that such definitive words are incorporated in and made a part of the section (see Bardes vs. Bank, 178 U. S., 524, 534), and that the portion of the act relied upon by the trustee is subdivision d of this same section.
>
> "In section 60 congress was dealing with creditors, and preferred creditors at that." (Petitioners' brief, bottom page 5 and top of page 6).

An examination of section 60 of the bankrupt act clearly shows that it is not only entitled, but it does deal entirely with preferred creditors. Subdivision a defines what a preference is; subdivision b describes the conditions under which the property conveyed or its value may be recovered by the trustee from the preferred creditors, and subdivision c provides for a set-off against a preference. While these

subdivisions of the section have to do with preferred creditors, it should be noticed, also, that the purpose of the provision is to enable the trustee to recover the preferences for the benefit of the estate.

Now, subdivision d, the part of the section in which we are particularly interested, provides that if, in contemplation of bankruptcy, a bankrupt has paid money or transferred property to an attorney at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court, on petition of the trustee or any creditor, and the transaction shall be held valid only to the extent of a reasonable amount, to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

As pointed out by counsel, an attorney under these circumstances is a preferred creditor. Why is he a preferred creditor? Because, under this provision of the bankrupt act, a transaction such as is involved in this proceeding is made a voidable one by the terms of section 60d, and the court is given the power to inquire into the transaction, on petition of the trustee or any creditor, and to avoid the transaction and to separate the valid from the void, and upon such a re-examination the value of the services which the attorney has rendered becomes a preferred claim in favor of the attorney, and the balance becomes an asset of the estate to be recovered by the trustee. When a transaction comes within this subdivision, and in a proceeding under this section the court determines the reasonable value of the services rendered by the attorney, a valid claim is thereby determined in favor of the attorney, and he, therefore, be-

comes and is treated as a preferred creditor. It was, therefore, proper to place this subdivision under the title of "preferred creditors." And it is also shown by counsel that the parties to a proceeding in bankruptcy "include the bankrupt, the trustee, and all creditors" (see Petitioners' Brief, top of page 11).

But notwithstanding counsel agree with us that an attorney under these circumstances is a creditor of the estate, and, therefore, a party to the proceeding, still they maintain that the amount of his claim can not be determined in the court of bankruptcy in which the bankruptcy proceedings are pending, unless he lives within the territorial limits of the district, and is served with process within the district. It must be remembered that in a proceeding of this character the bankruptcy court is not attempting to render a judgment against the attorney or require him to turn over money or property to the trustee, but is simply inquiring into the question of the amount of his claim against the bankrupt for services rendered, just as it would in a case where a physician has rendered services to the bankrupt, and the court determines the value of those services. It may be the physician resides in another state, and he may think a judge or jury in his own state would allow him a larger sum for his services than a bankruptcy court in Colorado, and the attorney may prefer to have his claim determined in his own state court; but under the bankruptcy act both must submit to the finding of the court in which bankruptcy proceedings are pending. Now, what is the difference between the position of the physician and the position of the attorney in this respect under the bankruptcy law? There is no difference so far as the necessity

for a plenary suit is concerned; but there is this difference in the manner of the examination of their claims: In the case of the physician nobody can object or is injured if he does not see fit to present his claim and have it allowed, for if he does not, he, alone, suffers, and the other creditors secure a larger share of the assets; but in the case of the attorney, the trustee and the creditors are interested in having the amount of his claim determined so that the excess, if any, may be recovered for the benefit of the estate. The bankrupt act, therefore, does not, as in the case of the physician, leave it to the attorney's discretion as to whether the amount of his claim shall be determined, but gives the bankruptcy court the right to determine the amount of such a claim on petition of the trustee or any creditor. Is there any reason why the attorney should have the right to have the question of the reasonable value of his services determined in a plenary suit any more than that the physician should have that right? Is there any reason why it should be required to serve the attorney with a writ of subpœna within the territorial limits of the district in which the bankruptcy proceedings are pending any more than that the physician should be so served before his claim against the bankrupt may be entirely wiped out and lost? In the case of the physician, a notice is mailed to him wherever he may be, and he is bound by all the bankruptcy proceedings in the court where the estate is being administered. By the plain terms of the act the transaction between the attorney and the bankrupt is to be re-examined in a *proceeding in the bankruptcy court*, and that court alone has jurisdiction to re-examine it. All proceedings in bankruptcy are had

simply upon notice to the parties interested, and without service of process except in the case of the bankrupt himself, and yet counsel for petitioners contend that in the case of this particular proceeding in bankruptcy regular process must be served, which can be served only within the district.

If petitioners' position is right, what will result? It is plain that the trustee can not maintain a suit against petitioners under section 60b, nor under section 67e; that no plenary suit whatever will lie against them until this transaction has been re-examined under section 60d, and that the bankruptcy court in which these bankruptcy proceedings are pending is the only court that has the power to re-examine this transaction. If, therefore, petitioners can defeat this proceeding, they will be able to retain $9,000, which belongs to the creditors of this estate, and for which they have rendered no service or given anything of value.

We believe there should be no such result in the face of the plain and express terms of the bankruptcy act. And counsel's argument also leads to this absurd conclusion, namely, that if a bankrupt has attorneys in two districts where he has property, and makes to each the same payment for like services to be rendered, the transaction in the district of the adjudication can be re-examined, but the other can not, and recovery can be had in the former case, while in the latter the attorney will be entitled to retain the entire sum paid him. The bankruptcy act is remedial, and should be interpreted reasonably and according to a fair import of its terms with a view to effect its objects.

Question Two.

This question calls particular attention to one feature of Question One. It is unnecessary to discuss this question at length, for if our argument in regard to Question One is correct, then Question Two must likewise be answered in the affirmative.

Question Three.

This question can not be answered in the affirmative, unless it is held:

1. That this transaction may be re-examined in a plenary suit, without the preliminary proceeding having been taken in the bankruptcy court, as provided by section 60d.

2. That the District Court has jurisdiction in a case of this character.

3. That in a plenary suit, in the District Court, service of process can be made outside the district.

As we believe we have shown in our argument, in regard to Question One, the court of bankruptcy is given exclusive jurisdiction to re-examine such a transaction as is involved in this proceeding, before any suit can be maintained by the trustee to recover any excess, and therefore a plenary suit can not be maintained in the first instance.

If such a plenary suit would lie in the first instance, then we believe with counsel for petitioners that the District Court would have no jurisdiction in such suit, unless the case comes within section 60b or section 67e, and with them we believe a case under neither of those sections could be made out of the transaction involved in this proceeding. The facts to

be proved under those sections are very different from those necessary to be proved in the proceeding under section 60d.

If a plenary suit of this character could be maintained in the District Court, the only judgment that could be rendered in favor of the plaintiff would be a personal judgment against the defendants for the excess over and above the reasonable value of the services rendered by them, and to obtain such a judgment personal service of process upon the defendants would necessarily be required. We know of no case where, in a plenary suit, the relief asked for being a personal judgment against the defendants, process can be served beyond the territorial limits of the District. This phase of Question Three does not seem to have been noticed in the brief of petitioners.

For these reasons we believe Question Three must be answered in the negative, and the result is that if this proceeding can not be upheld, then petitioners will be allowed to retain $9,000, which they wrongfully withhold, and which, under the bankrupt act, belongs to the creditors of this estate.

We respectfully submit that Questions One and Two should be answered in the affirmative, and Question Three in the negative.

Respectfully submitted,

HARVEY RIDDELL,
Attorney for Wilbur F. Denious, Trustee,
Respondent.

In re WOOD AND HENDERSON.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 167. Submitted March 6, 1908.—Decided May 18, 1908.

Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular court to administer the property, that court may, in some proper way, call upon all parties interested to appear and assert their rights.

The bankruptcy court, or its referee, in which the bankruptcy proceedings are pending, has jurisdiction under § 60*d* of the bankruptcy act to reexamine, on petition of the trustee, the validity of a payment or transfer made by the bankrupt in contemplation of bankruptcy to an attorney for legal services to be rendered by him, and to ascertain and adjudge what is a reasonable amount to be allowed for such services and to direct repayment of any excess to the trustee; and if the attorney is a non-resident of the district an order directing him to show cause or a citation or notice of the proposed hearing may be served without the district.

Jurisdiction to reëxamine such a transfer was not conferred upon any state court.

The trustee may not maintain a plenary suit instituted in the District Court where the bankruptcy proceeding is pending against such attorney upon service of process made on such attorney, if he is a non-resident of that district, outside of the district.

THE facts are stated in the opinion.

Mr. W. Scott Bicksler, Mr. Edmon G. Bennett and *Mr. George L. Nye* for petitioners.

Mr. Harvey Riddell for respondent.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here upon certificate from the Circuit Court of Appeals for the Eighth Circuit.

The facts certified are: R. H. Williams had been adjudicated a bankrupt on January 13, 1904, in the District Court of the United States for Colorado. On the seventeenth of May, 1905, it appears that the trustee in bankruptcy (following § 60*d*) petitioned the court, representing that the bankrupt in contemplation of filing the petition in bankruptcy did pay to certain counsel, the petitioners in this case, at Hot Springs, Arkansas, $5,000 in cash, and transfer to them a certificate of deposit for $3,000, and a certificate of deposit for $1,795; that said money and property were transferred to said counsel, Wood and Henderson, by said Williams in contemplation of the filing of a petition in bankruptcy against him, within four months of the filing thereof, for legal services to be rendered thereafter by said Wood and Henderson. They were thereupon ordered to appear at the office of the referee, in the city of Colorado Springs in the State of Colorado, on June 20, 1905, and show cause, if any they had, why an order should not be made determining and adjudicating the reasonable value of the services rendered by the said attorneys for the said bankrupt, and that in default of their appearance the referee would proceed to hear and determine the matter on the evidence presented. It was ordered that a copy of the citation, together with a copy of the petition, be served on Wood and Henderson at Hot Springs, Arkansas, at least twenty days before the day set for the hearing. On the first day of August, 1905, the referee in bankruptcy, holding a court of bankruptcy, made the following order:

"It appearing to the court from the evidence that a copy of this application, together with a copy of the order to show cause issued thereon, returnable on the twentieth day of June, A. D. 1905, was duly served on said J. B. Wood and Jethro P. Henderson on the twenty-sixth day of May, 1905; and that

the said J. B. Wood and J. P. Henderson, not having appeared on the said twentieth day of June, 1905, herein, or shown to this court any cause why this court should not proceed to re-examine the said transaction; and it further appearing to this court that the matter of the said hearing has been duly continued from the said twentieth day of June until the first day of August, 1905, and that due notice of such continuance has been served upon the said J. B. Wood and Jethro P. Henderson, and that the said J. B. Wood and Jethro P. Henderson are fully advised that this hearing would be duly had on this day; and the said J. B. Wood and Jethro P. Henderson not having shown cause against the said application, and the court having heard the evidence on the part of the said trustee in support of the said application, and the arguments of counsel thereon, and the court being fully advised as to all matters of law and fact arising herein, the court doth find and adjudge that the said R. H. Williams, in contemplation of the filing of a petition in bankruptcy against him did, on the fifth day of December, 1902, transfer to said J. B. Wood and Jethro P. Henderson, attorneys at law, for services to be rendered, the sum of $5,000, lawful money of the United States, and one certificate of deposit for the sum of $3,000, issued by the Security Bank of Hot Springs, Arkansas, to the said R. H. Williams, and one certificate of deposit issued by the Arkansas National Bank of Hot Springs, Arkansas, to R. H. Williams for the sum of $1,795, the said two certificates of deposit having since been collected by the said J. B. Wood and Jethro P. Henderson. And the court doth find on reëxamination of the said transaction that the sum of $800 is reasonable compensation for the services rendered the said bankrupt under the terms of the transaction by which said money and property were transferred to the said J. B. Wood and Jethro P. Henderson, and doth find and adjudge that the said transaction is valid to that extent only, which the court determines and adjudges to be the reasonable value for said services."

It was thereupon ordered and adjudged that the transaction

was valid as to the sum of $800, found to be the reasonable value of the services and the trustee was ordered to proceed to recover the excess, being the sum of $8,995, from said Wood and Henderson. Thereupon, and after this order, Wood and Henderson appeared before the referee for the sole purpose of challenging his jurisdiction to make the foregoing order, upon the ground that neither the parties nor the subject-matter was within the jurisdiction of the District Court of Colorado. Thereafter the case was certified to the District Court, and in that court Wood and Henderson renewed their objection to the jurisdiction of the District Court, and that court affirmed the ruling of the referee; thereupon Wood and Henderson filed their petition in the Circuit Court of Appeals for a review of the order of the District Court, and challenged the jurisdiction of that court and the referee to make the order aforesaid, because they were citizens and residents of Arkansas; that the service of the notice of proceedings was made upon them at Hot Springs, in that State; that they had not appeared or submitted to the jurisdiction of the District Court except to raise the jurisdictional questions; that the subject-matter of the proceedings was certain transactions which took place wholly within the State of Arkansas. Thereupon the Circuit Court of Appeals certified three questions to this court, as follows:

"1. Has a District Court of the United States sitting in bankruptcy in which the proceedings in bankruptcy are pending, or its referee, jurisdiction under section 60*d* of the bankruptcy act to reëxamine, on petition of the trustee in bankruptcy, the validity of the payment of money or the transfer of property by the bankrupt, made in contemplation of the filing of a petition by or against him in bankruptcy, to an attorney or counsellor at law, for services to be rendered to him by such attorney or counsellor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services, and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where

such attorney or counsellor at the time of receiving such payment or property and at the time of the proceedings in question was a non-resident of the State, or of the district, in which the bankrupt court instituting such inquiry is located, and where the money or property was so paid to, and is held by, such attorney or counsellor outside of the district in which such court of bankruptcy sits, and the order to show cause, citation, or notice of the proposed hearing is served upon him without, and not within the district in which such court of bankruptcy sits?

"2. If a District Court sitting in bankruptcy has this jurisdiction, may it exercise it by means of an order and citation to show cause duly served on the attorney or counsellor outside of the district of the court of bankruptcy, such attorney or counsellor being a non-resident of the district in which the proceedings in bankruptcy are pending?

"3. May a plenary suit instituted by the trustee in bankruptcy against such attorney or counsellor in the District Court where the estate in bankruptcy is being administered be maintained upon service of process upon the attorney or counsellor, who is a non-resident of the district, outside of that district?"

An answer to these questions involves the construction of § 60*d* of the bankruptcy act of 1898, which reads:

"60*d*. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney or counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reëxamined by the court on the petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

This section does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate with a view to permitting only a

reasonable amount thereof to be deducted from it because of payments of money or transfers of property to attorneys or counsellors in contemplation of bankruptcy proceedings. There is no provision for the enforcement of this section in another court of bankruptcy, where the bankrupt may be personally served with process in a plenary suit; such court is not given authority to reëxamine the transaction. No other court has authority to determine the reasonable amount for which the transaction can stand. *Swartz* v. *Frank*, 183 Missouri, 439.

Section 60*d* added a feature to the bankruptcy act not found in former acts, regulating practice and procedure in bankruptcy, therefore adjudications upon other provisions of the bankruptcy act, or concerning the judiciary act giving jurisdiction to the courts of the United States have no binding effect in the construction of this section.

This is not a case of preference, where part of the estate is transferred to a creditor so as to give to him more of the estate than to others of the same class under § 60 of the bankruptcy act, nor is it a case of fraudulent conveyance under § 67. It is a transfer in consideration of future services, to be reduced if found unreasonable in amount. In *Furth* v. *Stahl*, 205 Pa. St. 439, the opinion is by Mr. Justice Mitchell, and, speaking for the Supreme Court of Pennsylvania, the learned justice, after quoting § 60*d*, says:

"A pledge or payment for a consideration given in the present, or to be given in the future, whether in money or goods or services, is not a preference. The object of prohibiting preferences is to prevent favoritism, whether for secret benefit to himself or other reason, among a debtor's creditors who ought in fairness to stand on the same footing. A transaction by which the debtor parts with something now, in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against. Section 60 therefore expressly recognizes this class of transactions; but, as it is capable of abuse, provides for a reëxamination and re-

duction, if necessary, to a reasonable amount by the court on the petition of the trustee or a creditor."

The same statute was before the Court of Appeals for the Sixth Circuit in the case of *Bothe* v. *Pratt*, 130 Fed. Rep. 670. In that case, in speaking of the provisions of § 60*d*, Judge Severens, speaking for the court, said:

"It would rather seem that Congress, engaged, as many signs indicate, in guarding the assets of those in contemplation of bankruptcy, to the end that they might be brought without unnecessary expenditure to the hands of the trustee for distribution to creditors, while it would not deny to the debtor the right to employ and pay for legal assistance in his affairs during that critical period, yet proposed a restraint upon that privilege by requiring that such payment should be reasonable in amount—in short, proposed to apply to the incipient stage of bankruptcy the provident economy which it sought to apply to the administration of the bankrupt estate. It may have been thought that there was the same reason for such restraint at that stage of affairs as subsequently. And it is to be observed that the transaction would not become the subject of revision unless bankruptcy ensued. It put attorneys, solicitors and proctors in no worse position than it did some other classes of those having business with the debtor."

And the court reached the conclusion that there having been no petition of the trustee or any creditor to inquire into the reasonableness of the compensation to be paid attorneys in contemplation of bankruptcy, his claim should be allowed, and the learned judge adds: "As the rights of the parties are governed by the specific provision of the statute relating to the subject, no question of preference by reason of the payments arises."

The bankrupt act itself leaves no doubt as to what is a preference which can be sued for in another jurisdiction, for the section (60) provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing

of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

To undertake to bring within this definition of a preference, requiring a plenary action for its recovery, the protection given a bankrupt's estate, because of a transfer of property or money to an attorney or counsellor for services to be rendered in contemplation of filing a petition in bankruptcy, is to add to the clearly defined preferences contemplated by the act, and is to include entirely different transactions, not embraced in the statutory definition of a preference as Congress has defined that term.

Section 60*d* is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And in view of the circumstances the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, reëxamine it with a view to a determination of its reasonableness.

The section makes no provision for the service of process, and in that view such reasonable notice to the parties affected should be required as is appropriate to the case, and an opportunity should be given them to be heard.

We see no reason why notice of the proceedings under § 60*d* may not be by mail or otherwise, as the court shall direct, so that an opportunity is given to appear in the court where the

estate is to be administered and contest the reasonableness of the charges in question.

Congress has the right to establish a uniform system of bankruptcy throughout the United States, and having given jurisdiction to a particular District Court to administer and distribute the property, it may in some proper way in such a case as this call upon all interested to appear and assert their rights.

Our attention is called to other cases in which this view has been taken of this section of the bankruptcy act. In *In re Lewin*, 103 Fed. Rep. 850, it was held that a proceeding upon the petition of a trustee under this section is one administrative in its character, and that jurisdiction was not dependent upon service of regular process as in a suit, but is expressly given by statute, and that a notice of the hearing before the referee given by mail to the attorneys in interest a reasonable time before the hearing was sufficient. In speaking of this section Judge Wheeler says:

"This is not a suit such as is mentioned in that clause of section 23, but is an administrative proceeding, of which the bankruptcy court has express jurisdiction, given by this clause 'd' of section 60, if it would not have any by the general grant of jurisdiction over bankrupts and their estates, and of their attorneys in the proceedings, as officers of the court. This specific provision seems rather to have been intended for requiring specific vigilance in this quarter, and for providing for a recovery of any excess from the attorneys, than for any special grant of jurisdiction, which, however, it plainly gives. The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in *Rosser's case*, cited. He says, at page 159, Am. Bankr. R. and page 567, 101 Fed. Rep.:

" 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice

must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.' "

Jurisdiction to reëxamine the transfer to counsel was certainly not conferred upon any state court. When the statute says that if the transfer in contemplation of filing a petition in bankruptcy shall be found to be excessive it may be reduced by "the court," is it possible that it was intended to give the state courts jurisdiction of that much of the administration of the estate, and oust the District Court of the United States, and perhaps delay the settlement of the estate until the state courts of original and appellate jurisdiction should determine the reasonableness of the counsel fee provided for in contemplation of bankruptcy? The answer to this question is obvious, and clearly against a construction which has this effect upon the system of bankruptcy to be administered in the District Courts of the United States established by the act of Congress.

It is true that the state courts under the bankruptcy act as it stood before the amendment of February, 1903, were given jurisdiction to entertain suits to recover preferences to the exclusion of the Federal courts, unless the defendant consented to be sued in the Federal court. *Bardes* v. *The Bank*, 178 U. S. 524. The District Courts had jurisdiction only over proceedings in bankruptcy, as distinct from plenary suits against third persons having possession of transferred property, to be exercised when the District Court had acquired jurisdiction of the bankrupt's property. *Bardes* v. *The Bank*, *supra*; *White* v. *Schloerb*, 178 U. S. 542; *Bryan* v. *Bernheimer*, 181 U. S. 188; *Whitney* v. *Wenman*, 198 U. S. 539.

Section 60*d* is a part of the original Bankruptcy Act of 1898, and intended by Congress to be a part of a uniform system of bankruptcy to be consistently administered by the courts given jurisdiction. Suppose, then, instead of obtaining the order in the District Court administering the property, the trustee, because he could not get personal service upon the attorneys, had gone to any court within the limits of the State of Arkansas,

state or Federal, upon the theory of a preference, and obtained jurisdiction by valid service of process, it was in the power of the defendants to end the suit by refusing to consent to the jurisdiction of such court. If suit was begun in the state court of Arkansas that court would have answered, as did the Supreme Court of Missouri in *Swartz* v. *Frank*, 183 Missouri, 439, the bankruptcy act confers no jurisdiction upon a state court to entertain an application of the trustee, or of a creditor to reduce the provision made for counsel, that jurisdiction is given alone to the District Court of the United States administering the property. If the action had been brought in the United States court it would have made the same answer, and, in addition thereto, the jurisdiction of the Circuit or District Court of the United States could have been ousted, prior to the amendment of 1903, by the defendants withholding their consent to the jurisdiction of the Federal court. It is true that by the amendment referred to (the act of February, 1903) concurrent jurisdiction with the state courts is now given to the Federal courts, to suits for the recovery of property under § 60, subdivision *b*, and § 67, subdivision *e*. These last-named sections have reference to suits to recover preferences or fraudulent conveyances. No attempt has been made to change the exercise of jurisdiction under § 60*d*. The transfer to counsel may be wholly sustained; it is certainly valid to the extent that it is reasonable. It is neither a preference nor a fraudulent conveyance, as defined by §§ 60*b* or 67*e* of the act.

It is to be noted that in this case, as the statement of the certificate shows, the District Court rendered no judgment against the defendant for a recovery of the excess, but directed the trustee to bring an action therefor. It simply assumed and exercised the jurisdiction conferred by § 60*d* to determine the amount of the excessive transfer for a counsel fee provided in view of filing a petition in bankruptcy. It may be that this order, though binding upon the parties, cannot be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed.

We reach the conclusion that no reëxamination can be had in this transaction, except in the District Court of the United States administering the estate.

If the opinions of text-writers are to be looked to—and certainly they are entitled to much respect—they have spoken with clear meaning as to the section of the Bankruptcy Act which is the subject-matter now under consideration. In Loveland on Bankruptcy (3d ed.), p. 166, that author says:

"The petition by the trustee to reëxamine a transaction between the bankrupt and his attorney under this section is administrative in character, of which the court of bankruptcy has jurisdiction, irrespective of section 23 of the act."

And in Collier on Bankruptcy, 6th ed., the rule is thus stated (p. 492):

"The practice on proceedings of this character—the attorney being usually an officer of the court—is both simple and summary. Being rarely resorted to, there are no stated rules or forms applicable. The amount paid must appear in schedule B (4) of a voluntary petition. Any notice to the attorney directed by the court is sufficient. The motion may be heard on affidavits or orally. A suit to recover will rarely be necessary; though an order to restore, if not obeyed, is perhaps not now the foundation for a proceeding in contempt."

In Brandenburg on Bankruptcy (3d ed.), § 971, it is said:

"This provision [60*d*] recognizes this fact [the right to employ counsel] and approves the payment by the bankrupt to such attorney of reasonable compensation. The reasonableness of it may be inquired of by the court upon the petition of the trustee or any creditor. This proceeding is administrative in character, in which the jurisdiction of the court is not dependent on the service of process but is expressly given by statute and a notice of hearing therein given by mail a reasonable time before the hearing is sufficient."

And in the latest work on the subject, Remington on Bankruptcy, the rule is thus stated:

"The court has jurisdiction over the attorney to require re-

payment by him. Such jurisdiction may be exercised in the bankruptcy proceedings themselves; and its exercise is not violative of the rules regarding the form for suits against adverse claimants; moreover, it is provided for by a special clause of the bankrupt act itself. Such reëxamination should be had, however, only on due notice to the attorney concerned." Sec. 2099, p. 1298.

The construction which we have given § 60*d* does not deprive parties of rights secured under the Seventh Amendment of the Constitution to trials by jury in suits at common law where the value in controversy exceeds twenty dollars. This provision of the Constitution extends to rights and remedies peculiarly legal in their nature, and such as it was proper to extend in courts of law by the appropriate modes and proceedings of such courts. *Shields* v. *Thomas*, 18 How. 253–262.

This section in effect confers a special jurisdiction in a bankruptcy proceeding; it is only available when property has been transferred in contemplation of the filing of a petition in bankruptcy. When the affairs of one about to be adjudicated a bankrupt are in that situation, then the act, recognizing the right of the bankrupt to legal services to be rendered, undertakes to prevent the diminution of the estate to be administered and distributed for the benefit of creditors beyond a fair provision for counsel under such circumstances. To the extent that the provision is unreasonable the transfer is not given the effect to separate the property from the bankrupt's estate. As to this excess, the estate comes, within the meaning of the bankruptcy act, within the jurisdiction of the court, and will be ordered to be restored and administered for the benefit of creditors. The order contemplated can only be made after reasonable notice, which the facts certified in this case show was given to the petitioners.

The first and second questions should be answered in the affirmative and the third, as having application to a suit before the order is made in the bankruptcy proceeding, in the negative.

MR. JUSTICE BREWER, with whom MR. JUSTICE PECKHAM and MR. JUSTICE MOODY concurred, dissenting.

I am constrained to dissent in this case, and will state my reasons therefor. The facts are sufficiently given in the opinion of the court. The petitioners were lawyers, living at Hot Springs, Arkansas. They had never been within the State of Colorado, or appeared in the District Court except to file their petition for review, and the only service upon them was made in Arkansas by the delivery of a copy of the application and an order to show cause. The District Court of Colorado, the court in which the bankruptcy proceedings were had, confirming the report of the referee, adjudged that of the money paid to the petitioners employed by the bankrupt in anticipation of proceedings in bankruptcy to render services therein, the sum of $800 was a reasonable compensation for such services, and ordered that the trustee proceed to recover the excess from petitioners. Justification for this order is found in this paragraph of the bankruptcy act:

"SEC. 60*d*. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be reëxamined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate." 30 Stat. 544, 562.

It is said that this was an administrative and not a judicial proceeding. Three possibilities are suggested by the section. One is that the bankruptcy court, after an examination, may find that there is reason to believe that the attorneys have been paid an excessive sum, and direct the trustee to proceed by action in any court acquiring jurisdiction of the persons of the attorneys to recover what by that court shall be adjudged excessive. This would be a strictly administrative proceeding,

and if that were the conclusion of the court I should have nothing to say in the way of dissent. Another is that the bankruptcy court both adjudicates the amount of the excess—the amount which has been wrongfully paid to the attorneys, and by which, in effect, they have been preferred to the prejudice of creditors of the bankrupt, and also awards process for the collection of that excess. This is not suggested in the opinion of the court, which in effect holds the third possibility, to wit, that the bankruptcy court can adjudicate the amount of the wrongful prepayment, leaving the recovery of that amount to be accomplished by action in a court acquiring jurisdiction of the person in the ordinary way of legal proceedings. Such a construction is inconsistent with the whole history of the jurisdiction of District and Circuit Courts since the foundation of the Government, and is, indeed, against the construction placed on other provisions of the present bankruptcy law.

By Article VI of the Amendments to the Constitution criminal prosecutions are limited to "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." By this, so far as criminal cases are concerned, a state locality of jurisdiction is established beyond the power of Congress to disturb. We need not stop to inquire whether Congress can invest the District Court of a single district or State with a jurisdiction in civil cases operative through the whole length and breadth of the country, but has it done so?

The original judiciary act, passed in 1789 (1 Stat. 73, 79), provides, in respect to Circuit Courts, that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." See also with respect to the jurisdiction of District Courts, Rev. Stat. § 563, and with respect to that of Circuit Courts, Rev. Stat. § 629.

Construing the judiciary act of 1789, it was said in *Toland* v. *Sprague*, 12 Pet. 300, 328:

"The judiciary act has divided the United States into judicial districts. Within these districts a Circuit Court is required to be holden. The Circuit Court of each district sits within and for that district, and is bounded by its local limits. Whatever may be the extent of their jurisdiction over the subject-matter of suits, in respect to persons and property, it can only be exercised within the limits of the district. Congress might have authorized civil process from any Circuit Court, to have run into any State of the Union. It has not done so. It has not in terms authorized any original civil process to run into any other district; with the single exception of subpœnas for witnesses, within a limited distance."

While the general conditions of jurisdiction of the Federal courts were in some respects changed by the act of August 13, 1888 (25 Stat. 433), the change does not affect the present question.

Before the District Court of Colorado could in ordinary matters acquire jurisdiction over the person of one not found within its territorial limits, there must be a voluntary appearance of the defendant. He cannot, in an ordinary litigation, be brought into that court by service of process outside the limits of the court's jurisdiction. It has been held that the Circuit Court of one State has no jurisdiction in matters such as the sale of real property beyond the limits of the State. *Boyce's Exrs.* v. *Grundy*, 9 Pet. 275; *Miss. & M. R. R. Co.* v. *Ward*, 2 Black, 485; *Northern Indiana R. R. Co.* v. *Michigan Central R. R. Co.*, 15 How. 233. It is true that when suit is brought to enforce any legal or equitable claim against real or personal property within the district where the suit is brought one who is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, can be brought into court by personal service outside the limits of the district or by publication, as the court may direct, but any adjudication made in that suit, as regards such absent defendant without appearance, affects only his property within the district. Rev. Stat. § 738. So where suit is brought to foreclose a mortgage or trust deed on property

situate in several States the settled practice is for proceedings of foreclosure to be commenced in one court, called the court of primary jurisdiction, and then, in order to establish and maintain judicial control over the property in the other States, obtain ancillary administration in those States; although if the defendant, the owner of the property, is brought into the court of primary jurisdiction that court may act upon him and compel him to do with the property that which ought to be done. But in all these cases either the person or the property is within the territorial jurisdiction of the court.

When an individual, not an inhabitant of the State or district and not found therein, is sought to be charged, by reason only of his indebtedness to a defendant duly served, jurisdiction is not acquired by mere service of notice outside the State, for the fact of indebtedness does not bring him within the jurisdiction of the court. While for some purposes the *situs* of a debt may accompany the creditor, yet that *situs* is not sufficient to give to a court jurisdiction of a personal action against the debtor; that must be maintained in the State where the debtor is found.

Now the recovery of an amount due or of property belonging to an individual or an estate is ordinarily by a common law action. That the claimant is an estate and in the hands of a trustee or receiver does not change the nature of the proceeding. Suppose one of our large railroad properties is in the hands of receivers, can it be tolerated that the amount of the indebtedness by any individual to that estate can be determined absolutely by the court without a jury? If this be so, what becomes of the protection given by Article VII of the Amendments to the Constitution, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved"? Even if an action has to be brought to obtain the process of execution in the State where the alleged debtor resides, of what significance is it if the amount which is to be recovered is already settled, not by a jury, but by a court acting independently and in a prior pro-

ceeding? If the benefit of a trial by jury can in that way be taken away it will take but little ingenuity on the part of lawmakers to provide for the total destruction of the right of trial by jury, a right which has been considered of priceless benefit in all English-speaking nations, and the protection of which is imbedded in the National as well as state constitutions.

How appropriate in this connection is the language of Mr. Justice Bradley, delivering the opinion of the court in *Boyd* v. *United States*, 116 U. S. 616, 635, where, speaking of an attack upon another constitutional provision, he says:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Again, it is said that an excessive prepayment to an attorney does not come within the technical definition of a preference, as stated in § 60:

"SEC. 60*a*. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

An attorney rendering services becomes thereby a creditor of the client, and if he is paid more for the services than they are worth he has received as creditor more than he is entitled to

and comes within the spirit, if not the letter, of § 60, which provides that "a person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition . . . made a transfer of any of his property, and the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." The idea of bankruptcy is that the bankrupt is unable to pay his debts in full, and if the attorney has received payment in full he has received a greater percentage of his debt than any other creditor.

While § 60*d* is not in the bankruptcy act of 1867, obviously it was specially inserted in the present act for the purpose of making clear the liability of counsel receiving payment in advance. It is simply a declaration that an excessive prepayment to counsel employed with a view to bankruptcy proceedings is to be considered, so far as the excess is concerned, a preference and recoverable by the trustee in bankruptcy. And unless a contrary intent be clearly manifested the proceeding to recover that preference should be in the same way and by the same tribunals that have jurisdiction of any other proceeding to recover money or property given by way of preference. It would be giving an unreasonable extension to language to make it not simply a declaration of the right to recover, but also a limitation of the tribunal in which the recovery can be had or the amount due determined—a limitation not obtaining in respect to any other preference.

In *In re Waukesha Water Company*, 116 Fed. Rep. 1009, it was held by the District Court of the Eastern District of Wisconsin that "the bankrupt act of 1898 confers no power on a court of bankruptcy to summon before it by a rule to show cause third persons who are not parties to the record and who reside without the district and State, and are there served with the order, and under the general rules of law governing the Federal courts, in the absence of express authority, such service is ineffectual to confer jurisdiction *in personam*."

Again, it is suggested that § 60*d* provides for proceedings in the bankruptcy court—no vesting of jurisdiction in any other than that court—and it is said there is no provision for a plenary suit to recover the amount of the excessive prepayment and none for a jury. But by the bankrupt act of March 2, 1867, the general jurisdiction over bankruptcy proceedings was vested in the court in which they were commenced, and there was no special provision for ancillary proceedings in the courts of other districts, and yet it was decided that those ancillary proceedings might be held that seemed to be the necessary result of the general jurisdiction conferred and to be in harmony with the design and scope of the act. As said by Mr. Justice Bradley, in *Lathrop, Assignee,* v. *Drake,* 91 U. S. 516, 517, 518:

"Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. . . . Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act."

For these reasons, thus outlined, I must dissent from the opinion and judgment of the court.